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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 082 50388 Office: TEXAS SERVICE CENTER Date: APR 26 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides software consulting and it seeks to employ the beneficiary as a systems analyst – SAP specialist. The petitioner endeavors to extend the classification of the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition on the basis that the beneficiary had reached the time limit for an H-1B nonimmigrant's temporary admission to the United States, and was not eligible for additional time beyond the six-year limitation in H-1B nonimmigrant status. The director noted that the beneficiary was out of the country and not in possession of a valid H-1B visa.

On appeal, counsel states that Congress intended for section 11030A(a) of the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act) to extend H-1B non-immigrant status to an alien who had departed from the United States after reaching the six-year limitation in H-1B nonimmigrant status.

Upon review of the evidence in the record, the AAO finds that the beneficiary is not eligible to derive benefits from either the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) or the 21st Century DOJ Appropriations Act.

The evidence in the record contains, in part, the following: (1) the Form I-129 petition; (2) the Final Determination notice from the U.S. Department of Labor; (3) the ETA 750 Form with a receipt date of January 25, 2002; (4) conference report statements by Senator Patrick Leahy and Representative Lamar Smith; and (5) the denial letter.

Section 106(a) of the AC21 allowed an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six year maximum period when: (1) the alien was the beneficiary of an employment-based immigrant petition (Form I-140) or an application for adjustment of status; and (2) 365 days or more had passed since the filing of the Form ETA 750 or the Form I-140. Section 104(c) of the AC21 enables H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

On November 2, 2002, the 21st Century DOJ Appropriations Act was signed into law; it amended section 106(a) of the AC21 by broadening the class of H-1B nonimmigrants who may avail themselves of its provisions. The amendment to section 106(a) of the AC21 permits an H-1B nonimmigrant to obtain an extension of H-1B status beyond the six-year limit when: (1) 365 days or more have passed since the filing of Form ETA 750; or (2) 365 days or more have passed since the filing of Form I-140. Section 106 of the AC21 allows for H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period.

The AAO finds unpersuasive counsel's assertion that the intent of Congress would be to allow the beneficiary to extend H-1B nonimmigrant status after the beneficiary departed from the United States upon reaching the six-year limitation in H-1B nonimmigrant status. No legal ground exists to support counsel's assertion.

Conference report statements by Senator Patrick Leahy and Representative Lamar Smith do not establish a legal basis to support counsel's assertion.

Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984); *Shaar v. INS*, 141 F.3d 953, 956 (9th Cir. 1998); *Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991). Section 104(c) of the AC21 explicitly allows H-1B nonimmigrants to extend their H-1B nonimmigrant status beyond the six-year maximum period, and section 106 of the 21st Century DOJ Appropriations Act has the same provision. However, both the AC21 and the 21st Century DOJ Appropriations Act require that the nonimmigrant hold H-1B status in order to extend H-1B nonimmigrant status beyond the six-year period. No provision in either section would allow the beneficiary in the immediate petition, who departed from the United States after reaching the maximum period of stay in H-1B nonimmigrant status, to now extend H-1B nonimmigrant status beyond the six-year period.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is eligible to extend H-1B nonimmigrant status beyond the six-year maximum period. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.